

INFORMATION

For the Creditors of Mr. John Monigomery,

AGAINST

Sir JAMES SHARP of Stonybill.

IN June 1678. Sir James Cockburn of that Ilk, and Sir James Sharp of Stonyhill became bound in 5000 Merks to Margaret Boyd in Liferent, and Mr. James Douglas of Earnslaw, and Archibald Douglas Sons to Mr. Robert Douglas, payable at certain Terms contained in the Bond.

In February 1690. there's a Bond of Corroboration by Charles Earl of Lauderdale, the said Sir James Cockburn, and Sir William Sharp, for the foresaid Sum, and of the same Date, there is a Bond of Relief granted by the Earl of Lauderdale to the other Obligants.

In February 1694. there are Decrets of Adjudication of the Earl and Sir William's Estates, at the Instance of the said Mr. James and Archibald Douglasses, and in the Year 1702. Mr. John Montgomery acquires Right to 3500 Merks of the said Bond, and Diligence thereupon, from Mr. James Douglas of Earnslaw, the other 1500 Merks remaining with Archibald Douglas the other Brother.

Sir Robert Dickson, Baronet, having purchast the Lordship of Messelburgh from the Earl of Lauderdale, it was, it seems, concerted betwixt the Earl and Sir Robert, that the purchase Money of this Estate, and other Lands likewise sold to Sir Robert, should not be paid into the Earl's Hands; but that Sir Robert should therewith transact the Earl's Debts, and accordingly some were transacted by him, and he had likewise a View of transacting others, whereupon in May 1703. there is an Account made up, and docqueted, in which Sir Robert debits himself with the Price of the Lands, and he takes Credit for several Payments made by him to Creditors, conform to Vouchers referred to in the Account. But when he comes to place Earnslaw and Archibald Douglas's Debt of 5000 Merks in the Credit, he nether states it as paid to Earnslaw, or any Person else; nor does he refer to any Writ or Vouchers, got by him from the Creditors, for Payment of this Debt; so that it is obvious, that Allowance was only given in the View, that Instructions should afterwards be produced, that, that Debt was truly paid, and the Earl's Estate, and such as were bound with him, discharged thereof.

For the Docquet subjoyned to the Account of the Date foresaid, bears, that it was accordingly agreed unto, that the said Account should be the Method and Rule of counting betwixt the Parties, Sir Robert Dickson always producing the Instructions of the Articles of Discharge, and that the Balance of the Account yet in Sir Robert's Hands, should be applied in Payment of the Earl's preferable Creditors upon the Estate.

In the Year 1705. Mr. Montgomery acquires from Archibald Douglas the Remainder of the Bond, and Diligence, which was not in his Person the Time of the docqueting of the said Account, to which Mr. John is indeed a Witness; and this is further a direct Evidence, that the Article in the foresaid Account, with respect to this Debt, was only stated with a View which Sir Robert had, to the purchasing of the said Debt from the Persons who should be Creditors at the Time, and that tho' Allowance was given in this View, yet still Sir Robert was not exoner'd, till in the Terms of the Docquet, he had produced the Vouchers of the Payment, which he never could do, Part of the said Debt being in the Person of Mr. John Montgomery, and Part of it at this Time in Mr. Douglas's Person, which Mr. John, two Years thereafter acquired with his own Money.

Upon the 16 April 1706. there is another Account fitted bewixt the Earl of Lauderdale and Sir Robert Dickson, and the Docquet bears, That the said Instructions of the Articles of Discharge of that, and the preceding Account, were delivered up by Sir Robert to the Earl, except such Writs relating to that, and the preceding Account, not delivered to the said Earl, for which Sir Robert had granted an Obligation of the same Date with the Docquet. And when this Obligation is looked into, it bears a Declaration, That, altho' Sir Robert had granted a Disposition of that Date,

of the several Rights and Adjudications, standing in his Person, affecting the Lordship and Regality of Thirlestoun and Musselburgh, bearing Delivery of the Writs, conform to an Inventory; yet, the Truth was, that he had not delivered up the said Writs; and therefore, obliged himself to make up an Inventory, and deliver the same; and particularly, that he should dispose to the Earl, any Rights taken in his Name of Sir William Sharp, Crawford of Monorgan, and Forbes of Watertoun their Debts. And to this Obligation Mr. John Montgomery is a Witness.

Sir James Sharp has disposed his Estate of Stonyhill to Colonel Charteris, and for clearing the Purchase of this Adjudication, for the Douglasses Debt and Diligences, he has raised a Reduction and Declarator of Extinction, to which he has made the Earl of Lauderdale, Sir Robert Dickson, and the Creditors of Mr. John Montgomery Parties, concluding against the Earl, upon his Predecessor's Bond of Relief, and against Sir Robert, that he had of the Earl's Effects, in order to pay this Debt, and against the Creditors of Mr. John Montgomery, that the Debt was taken in his Name for Sir Robert's Behoof; whereupon the several Parties having been heard, before my Lord Milton Ordinary, his Lordship is to report the Point of Declarator, and Debate that thereupon ensued.

And as to the Conclusion of Relief against the Earl Lauderdale, arising from the Bond for that Purpose, and how far the Earl may likewise have Action against Sir Robert Dickson, for Extinction of that Debt, upon the Accounts, and the foresaid Obligation, the Creditors, as your Lordships perceive, are not concerned to dispute, but as to the Conclusion against them, that they ought to denude of the Debt, transferred to them by their Debtor Mr. John, or that the same should be declared a Trust in his Person, either for the Earl of Lauderdale, or for Sir Robert's Behoof, they can see no Reason from the Debate, to support this Conclusion.

For, whereas it was alledged, that it was notour that Mr. John Montgomery was Doer, both for the Earl of Lauderdale and Sir Robert Dickson, the Creditors know nothing of it, but supposing it to be true, it does not from thence follow, that he was Trustee in this Debt, either for the one or the other; that he was not for the Earl of Lauderdale, is obvious from the Fact, as the Pursuer states it; and yet his being Doer or Writer for either the one or the other, concludes no more forcibly for his being Trustee for Sir Robert Dickson, than it does for his being Trustee for the Earl of Lauderdale: But indeed the Accounts plainly shew, that he was Trustee for neither, tho' that was a Point that the Pursuer behaved to make out, and it is sufficient for the Defenders, to rely upon a Denial of the Fact, and to plead, that it cannot be made out, now that Mr. Montgomery is dead, but by his Writ, in Terms of the Act of Parliament 1696.

And whereas the Pursuer urges, That it is made out by Mr. Montgomery's Writ, in so far as he is Witness to the Account in the Year 1703. whereof the Docquet is writ by his Servant, in which Sir Robert takes Credit for this very Debt.

It has been already noticed, that this Account was no final Account. The Docquet bears, that it was only framed as a Method and Rule of counting betwixt the Earl and Sir Robert, without Delivery up of any Instructions; besides that, even the Article, as it is placed in the Account, does not say, that it is paid by Sir Robert, or purchased by him, nor does it refer to any Voucher which Sir Robert had, for instructing of the Payment.

And as for the second Account, it is writ by the Earl's own Servant, and not by Mr. John Montgomery, or any of his Servants. It is true, he is Witness to the Docquet, which bears the Vouchers to be delivered up; but then it excepts the Vouchers which were not delivered up, conform to an Obligation by Sir Robert, but the Obligation shews, that the Exception was as general and wide as the Rule, and does not specially refer to the Docquet of the second Account, but to a Disposition granted by Sir Robert, to the Earl, of the same Date, of several Rights and Adjudications standing in his Person, that affected the Lordship and Regality of Thirlestoun, and still shews, that the Exception was as wide and general as the Rule, for it bears, that he had not delivered up the Writs, and therefore obliges him, that, as to any Writs that he had relative thereto, he shall make an exact Inventory thereof, and also obliges himself, on the Foot of the same, to make the Writs contained therein, forthcoming to the Earl, so that what were the Writs to be contained in the said Inventory, or to be made forthcoming to the Earl, is still uncertain from any Document yet produced. If there was another Obligation besides

sides this, which relates to the Disposition, it is not produced, and it falls to be in the Hands of the Earl, for the Writs are all said to be delivered up, except as to the Writs relating to this and the preceding Obligation Account not delivered to the said Earl, for which Sir *Robert* has granted Obligation of this Date.

But whether there were two Obligements, one relative to the Docquet of the second Account, and one relative to the Disposition, or that there was no more but one Obligation, which did expressly refer to the Disposition, and is the Obligation meant and understood in the Docquet of the second Account, it is of little Moment in the Question, because that it is evident, from all the Writs that are produced, that still Sir *Robert* had not delivered all the Instructions mentioned in his Accounts; and indeed the Exception is so large, that no Body can judge what was delivered, or what was not delivered. It is certain, that this Debt and Diligence remains still in the Person of Mr. *John Montgomery*. It is not pretended, that Sir *Robert Dickson* had any Right or Disposition denuding Mr. *Montgomery* of *Earnshaw's* Debt, tho' both of them survived this second Docquet several Years.

And that Sir *Robert Dickson*, at the Time of the second Account, had not *Earnshaw's* Debt in his Person, appears from this, that, with respect to those Debts Sir *Robert* had acquired Right to in his Name, he obliges himself expressly to dispoise them, particularly the Rights taken in his Name of Sir *William Sharp's* Debt, *Crawford of Monaghan, Forbes of Watertown*, or any others not contained in the Disposition, which three Debts were due by the Duke of *Lawderdale* to these Creditors, whose Debts they are called. If *Earnshaw's* Debt (which was likewise originally a Debt due by the Duke of *Lawderdale*, tho' his Brother and some other Friends became engaged in it, as appears by *Charles Earl of Lawderdale's* Bond of Relief produced) had been in his Person, why would he not likewise have obliged himself to dispoise that Debt?

It is true, there are some general Words in the End of that Clause, whereby he is bound to dispoise, not only these three Debts particularly mentioned, but any others not contained in the Disposition; yet, tho' Sir *Robert* became so bound, that could never denude Mr. *Montgomery*. The Right is still in him, until he should make it over to Sir *Robert*; and, from the whole, it appears, that there is nothing in all these Accounts, Docquets and Obligements that makes any Thing out as to the Transmision of *Earnshaw's* Debt by Mr. *Montgomery* to Sir *Robert*, or by Sir *Robert* to the Earl, only, that, by the Plan laid down (this being truly a Debt of the Duke of *Lawderdale's*) the Price was to have been applied for acquiring of it; but there is no Instruction to vouch, that ever it was in the Person of Sir *Robert Dickson* the Purchaser, or that he had made it over to the Earl of *Lawderdale*, or that Mr. *Montgomery's* Right was in Trust for Sir *Robert's* Behoof. Surely his acquiescing to its being brought into the Scheme as a Debt to be paid or acquired by the Price, will never import it. It was a Benefit to Mr. *Montgomery* to have it stated among those Debts that were to be paid by the Price; and he might very well witness that, since that the same Docquet burdened Sir *Robert Dickson* with the Production of the Instructions of the Accounts.

The Pursuer further says, it is presumed, that the Debt was acquired for Sir *Robert's* Behoof, because, when Mr. *John Montgomery*, upon his Failure, gave up a List of his Debts to his Creditors, this Debt was not therein contained. But of this Fact there is no Evidence. Mr. *John Montgomery* made no special List of his Effects; but, by the Disposition in favours of his Creditors, all his Effects are conveyed, which intitles the Creditors to every Debt that they can discover was in the Person of Mr. *John Montgomery*; and if the Pursuer should make good this Point against them, that because the Debt was not particularly mentioned in the Disposition, therefore the Creditors have no Right to it, it would indeed be of far more hurtful Consequence to the Creditors than the Loss of this Debt.

The Defenders have followed the Argument, and every Qualification of Trust that is mentioned in the Minutes of Debate, if the Pursuer go upon other Circumstances, they hope they will not be regarded, since he has not pled upon them in the Debate, nor produced any Voucher but these the Defenders have taken Notice of.

In respect whereof, &c.

J. A. GRAHAM.

J. GRAYMAN

